

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
MANUEL GONZALEZ :
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Petitioner, :
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-against- : OPINION
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THE UNITED STATES OF AMERICA : 03 Civ. 359 (RLC)
:
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Respondent. :
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APPEARANCES

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ROBERT L. CARTER, District Judge

On August 27, 2004, Manuel Gonzalez filed an amended complaint pursuant to 28 U.S.C. § 2255, seeking to vacate the judgment of conviction and sentence imposed by the court following his guilty plea to one count of participating in a racketeering organization, one count of conspiracy to commit murder, and one count of using a firearm in connection with the conspiracy to commit murder.

Gonzalez pleaded guilty on November 23, 1999, reaffirmed his guilty plea on March 20, 2000, and was sentenced on August 3, 2000, to thirty-five years' imprisonment. Holding that Gonzalez' habeas corpus petition violated a valid and enforceable plea agreement, the court declined to issue the writ.¹ On January 20, 2006, Gonzalez filed a notice of appeal with the court, which the court construes to be a request for a certificate of appealability ("COA").

DISCUSSION

Section 2253(c) of Title 28 (as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")) requires a habeas petitioner to obtain a COA

¹ The court also declined not to oppose Gonzalez' request (made to the Bureau of Prisons) for a nunc pro tunc retroactive designation of a state prison as a place of incarceration for his current federal sentence.

before taking an appeal to the Circuit Court of Appeals (the "circuit"). Federal Rule of Appellate Procedure 22(b) (as amended by AEDPA) states that when a petitioner lacks a COA and yet "no express request for a certificate is filed," then a notice of appeal "shall be deemed to constitute [such a request.]"

While the Federal Rules of Appellate Procedure ordinarily do not apply directly to this court, there is no reason why this court should not construe the petitioner's submission in the same manner as the circuit, since this court's authority to issue the COA derives from their rules of procedure. See Lozada v. United States, 107 F.3d 1011 (2d Cir. 1997) overruled on other grounds by United States v. Perez, 129 F.3d 255 (2d Cir. 1997). Consequently, the court considers Gonzalez' notice of appeal to be a request for a COA.

The court can issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Lozada, 107 F.3d at 1013. A petitioner, in other words, must demonstrate that an issue is debatable among jurists of reason or that the questions "deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983). Gonzalez has made

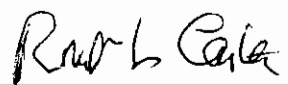
no showing of constitutional error in his submission, and consequently the court cannot issue a COA. Furthermore, since the allegations raised in Gonzalez' earlier petition were entirely without merit, no such demonstration would have been possible. Gonzalez v. United States, No. 03 Civ. 359, 2005 U.S. Dist. LEXIS 36330 (S.D.N.Y. Dec. 28, 2006) (Carter, J.).

CONCLUSION

Gonzalez' notice of appeal does not make a substantial showing of a denial of a constitutional right, and accordingly the implicit request for a certificate of appealability is DENIED.

IT IS SO ORDERED

Dated: New York, New York
April 11, 2006



ROBERT L. CARTER
U.S.D.J.

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